FILED
DEC 20 1993
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(2)

No. 93-800

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

IRENE MOJICA,

Petitioner,

v.

GANNETT COMPANY, INC.
OWNER OF WGCI-FM RADIO STATION,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of
Appeals for the Seventh Circuit

BRIEF OF GANNETT COMPANY, INC. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Seventh Circuit was correct in holding that conduct occuring before the enactment of the Civil Rights Act of 1991, Pub. L. 102-166, is not covered by the Act?

JURISDICTION

The judgment of the Court of Appeals was entered on September 27, 1993. This Court has jurisdiction to review the judgment of that Court under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e) *et. seq.*
Civil Rights Act of 1866, 42 U.S.C. § 1981
Civil Rights Act of 1991, Pub. L. No. 102-166

COUNTER-STATEMENT OF THE CASE

A. Factual Background

Plaintiff is currently employed by Gannett as an overnight (1:00 a.m. – 5:00 a.m.) disc jockey on WGCI-FM radio, a Gannett-owned urban contemporary[1] radio station in Chicago (R. 504). Plaintiff was initially hired by Gannett on July 27, 1979 as a part-time staff announcer on WVON-AM, the predecessor of the current WGCI-AM, and subsequently became a full-time disc jockey on that station in September, 1981 (R. 502). In January, 1987 Plaintiff became the full-time overnight disc jockey on WGCI-FM (R. 182). She currently holds this position (R. 177, 246-250, 402, 504).

Plaintiff alleged in her Complaint that, since joining the FM staff of WGCI in January, 1987, she has been denied the opportunity to transfer to a more desirable and more lucrative shift than the overnight shift to which she was assigned (R. Doc. 1). In support of her claim that she was denied such a transfer on the basis of her sex and national origin (Hispanic), Plaintiff relied principally on a comment allegedly made to her in the early 1980's by the station's General Manger, Marv Dyson, that he would not assign her to a non-overnight shift because she was not "a Black male" (R. 65, 91-92). Dyson denied ever making this comment (R. 440). Although Plaintiff's claims were couched in terms of national origin discrimination, the gist of her complaint was that she felt that she received less favorable treatment not because she was Hispanic, but because she was not Black.

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[1] Urban contemporary music is an industry term referring to music performed primarily by Black or African-American artists (R. 368-69).

B. Procedural Background

Plaintiff filed suit in the United States District Court for the Northern District of Illinois on July 6, 1990, alleging that she was paid less than male disc jockeys in violation of the Equal Pay Act and Title VII, sexually harassed in violation of Title VII, and denied more favorable air-shift assignments on the basis of her sex, her national origin, and in retaliation for complaining of discrimination, in violation of Title VII and 42 U.S.C. § 1981 (R. Doc. 1).

On November 12, 1991, in anticipation of the passage of the Civil Rights Act of 1991, Plaintiff filed a Motion to Amend her Complaint to include claims of compensatory and punitive damages and for a jury trial under the new statute (R. Doc. 40). On November 27, 1991, six days after the Civil Rights Act was signed into law, the District Court granted Plaintiff's Motion, holding that the Act applied retroactively to Plaintiff's claims. *Irene Mojica v. Gannett Company, Inc.*, 779 F.Supp. 94 (N.D. Ill. 1991).

Pursuant to the District Court's ruling, all of Plaintiff's claims were tried to a jury on December 2-5, 1991. The jury reached a verdict in favor of the Plaintiff on the national origin shift denial claim in the amount of $35,000 and awarded Plaintiff an additional $125,000 in punitive damages. The jury's verdict was in favor of the Defendant on all of the remaining claims. *Irene Mojica v. Gannett Company, Inc., owner of WGCI-FM Radio Station*, ___ F.2d ___, 1993 U.S. App. LEXIS 24897 (7th Cir. 1993) (included in Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, 37a) (hereinafter "Petitioner's Appendix, ___"). On December 13, 1991, the District Court granted in part Defendant's Motion for Judgment Notwithstanding the Verdict and set aside the jury's award of punitive damages (Memorandum Opinion and Order denying, in part, Defendant's Motion for Judgment Notwithstanding the Verdict) (Petitioner's Appendix, 54a-61a).

The Appellate Court reversed the District Court's ruling regarding the retroactive application of the Civil Rights Act of

1991 and vacated the jury's national origin verdict for Petitioner under both Section 1981 and Title VII. The Court also reversed and remanded the case to the District Court for retrial of Petitioner's Title VII national origin claim. *Irene Mojica v. Gannett Company, Inc., owner of WGCI-FM Radio Station,* ___ F.2d ___, 1993 U.S. App. LEXIS 24897 (7th Cir. 1993) (Petitioner's Appendix, 16a).[2]

SUMMARY OF THE ARGUMENT

There are at least two reasons why certiorari should be denied. First, the retroactivity of the Civil Rights Act of 1991 is currently being considered by this Court in *Landgraf v. USI Film Products, cert. granted,* ___ U.S. ___, 113 S. Ct. 1250 (1993). The disposition of this case should be in accordance with the ultimate ruling in *Landgraf,* to the extent applicable. Second, the Court of Appeals was correct in concluding that Sections 101 and 102 of the Civil Rights Act of 1991 only apply prospectively, based on this Court's most recent cases reaffirming the presumption against the retroactive application of statutes which alter substantive rights.

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[2] Petitioner mischaracterizes the *Per Curiam* order of the Court of Appeals pursuant to Circuit Rule 40(f) dated March 4, 1993 directing that the matter be considered *en banc*, and the dissenting opinion of Circuit Judge Cummings from that Order, as a "panel decision." Petition for Writ of Certiorari, pp. 4, 6, 7 (hereinafter, "Mojica's Petition"). In fact, no panel decision ever issued because of the invocation of Circuit Rule 40(f) by Judge Manion, a member of the original panel (Circuit Rule 40 is reproduced in the Appendix attached to this Brief at page 1a)

ARGUMENT

I. The Retroactivity Of The Civil Rights Act of 1991 Is Currently Being Considered By This Court In *Landgraf v. USI Film Products, cert. granted,* ___ U.S. ___, 113 S.Ct. 1250 (1993)

As Petitioner concedes in her Petition for Writ of Certiorari, this case presents the identical question of the retroactivity of the Civil Rights Act of 1991 (Pub. L. No. 102-166) heard by this Court in oral argument on October 13, 1993 in *Landgraf v. USI Film Products, cert. granted,* ___ U.S. ___, 113 S.Ct. 1250 (1993). Mojica's Petition, page 3. This Court should deny Mojica's Petition because it would be a waste of this Court's and the parties' resources to grant certiorari in a case which presents an issue identical to an issue that this Court is currently considering in another case.

The Seventh Circuit reversed the United States District Court for the Northern District of Illinois ruling regarding the retroactive application of the Civil Rights Act of 1991 and vacated the jury's national origin verdict for Petitioner under both Section 1981 and Title VII. The Seventh Circuit Court also reversed and remanded to the District Court for retrial on Petitioner's Title VII national origin discrimination claim. *Irene Mojica v. Gannett Company, Inc., owner of WGCI-FM Radio Station,* ___ F.2d ___, 1993 U.S. App. LEXIS 24897 (7th Cir. 1993) (Petitioner's Appendix, 16a). Certainly, the most prudent and efficient course of action is to proceed with this case in light of the eventual ruling in *Landgraf, supra.* The District Court can simply await this Court's decision in *Landgraf* before proceeding further.

II. The Court Of Appeals Correctly Concluded That The Civil Rights Act Of 1991 Only Applies Prospectively

The Seventh Circuit Court of Appeals correctly and clearly concluded that sections 101 and 102 of the Civil Rights Act of 1991 apply only to conduct occurring on or after the November 23, 1991 date of enactment:

> [t]he weight of history and tradition, as well as considerations of fairness, compel us to observe a presumption against retroactive application of newly-enacted statutes.

Irene Mojica v. Gannett Company, Inc., owner of WGCI-FM Radio Station, ___ F.2d ___, 1993 U.S. App. LEXIS 24897 (7th Cir. 1993) (Petitioner's Appendix, 8a).

> In sum, the district court erred by applying the new Act to this case. Because Gannett's alleged failure to promote Mojica — the conduct giving rise to her claim — took place before the enactment of the new Act, the former civil rights laws govern her case. To the extent some provisions of the new Act may apply to pending trials, no such provisions are implicated in this appeal.

(Petitioner's Appendix, 12a)

The district court erred by applying the Civil Rights Act of 1991 retroactively to this case.

(Petitioner's Appendix, 16a)

The Appellate Court's decision relies on this Court's most recent cases which reaffirm the presumption against retroactivity. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 109 S.Ct. 468 (1988) ("retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language

requires this result.") (citing *Greene v. United States*, 376 U.S. 149, 160, 84 S.Ct. 615 (1964)).[3] The soundness of the presumption against retroactivity was noted most recently by Justice Scalia in *Kaiser v. Aluminum & Chemical Corporation v. Bonjorno*, 494 U.S. 827, 110 S.Ct. 1570, 1586 (1990) (Scalia, J., concurring) ("[t]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.")

In light of this Court's most recent reiteration of the long-standing presumption against retroactivity, and the clarity and guidance which such a rule provides for both litigants and the courts, this Court should follow its precedent of applying the presumption against retroactivity and not disturb the Appellate Court's decision.

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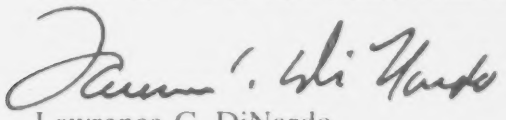
[3] *Claridge Apartments Company v. Commissioner of Internal Revenue*, 323 U.S. 141, 164, 65 S.Ct. 172 (1944); *Miller v. United States*, 294 U.S. 435, 439, 55 S.Ct. 440 (1935); *United States v. Magnolia Petroleum Company*, 276 U.S. 160, 162-163, 48 S.Ct. 236 (1928). *See also United States v. Security Industrial Bank*, 459 U.S. 70, 79, 103 S.Ct. 407 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student"); *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806) ("words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intentions of the legislature cannot be otherwise satisfied."); *Murray v. Gibson*, 56 U.S. 421, 423 (1854) ("[statutes] never should be allowed a retroactive operation where this is not required by express command or by necessary and unavoidable implication").

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GANNETT COMPANY, INC.,
owner of WGCI-FM Radio Station



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APPENDIX

CIRCUIT RULE 40. Petitions for Rehearing

(a) *Table of Contents.* The petition for rehearing shall include a table of contents with page references and a table of cases (alphabetically arranged), statutes and other authorities cited, with reference to the pages of the brief where they are cited.

(b) *Number of Copies.* Fifteen copies of a petition for rehearing shall be filed, except that 25 shall be filed if the petitioner suggests rehearing in banc.

(c) *Required Statement for Suggestion of Rehearing In Banc.* Suggestions that an appeal be reheard in banc shall state in a concise sentence at the beginning of the petition why the appeal is of exceptional importance or with what decision of the United States Supreme Court, this court, or another court of appeals the panel decision is claimed to be in conflict.

(d) *Time for Filing After Decision in Agency Case.* The date on which this court enters a final order or files a dispositive opinion is the date of the "entry of judgment" for the purpose of commencing the running of the 14 day period for filing a petition for rehearing in accordance with Rule 40(a), Fed. R. App. P., notwithstanding the fact that a formal detailed judgment is entered at a later date.

(e) *Time for Filing after Decision from the Bench.* The 14-day time limit for filing a petition for rehearing shall run from the date of this court's written order following a decision from the bench.

(f) *Rehearing Sua Sponte before Decision.* A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear in banc the issue of whether the position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule or procedure

may be similarly circulated before it is issued. When the position is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the circumstances, in substance as follows:

This opinion has been circulated among all judges of this court in regular active service. (No judge favored, or A majority did not favor) a rehearing in banc on the question of (e.g., overruling *Doe v. Roe.*)